

## CONSERVATION AND THE CONSTITUTION

With the avowed purpose of fulfilling the pledges contained in the Republican platform upon which he was elected, the President of the United States, early in the year, recommended to the favorable consideration of Congress "measures for the conservation of the public domain, for the reclassification of lands according to their greatest utility, and the vesting of power in the executive to dispose of coal, phosphate, oil and mineral lands and of water power sites in such a way as to prevent their monopoly and union of ownership in syndicate or combination." The measures so recommended provide for (1) the leasing of coal, phosphate, oil and other mineral lands upon a royalty basis, with provisions designed to prevent monopoly and to insure diligence in the working and development of the same; (2) the leasing of water power sites situate on the public lands upon either a royalty or a rental basis, with provisions designed to prevent monopoly and to insure early development, diligent utilization under competitive conditions, and the regulation of the prices of the power produced; and (3) the reclamation by the United States of its arid public lands. More recently the President has expressed his approval of a measure the purpose of which is to provide for the conveyance by the United States of the water power sites to the States wherein they are situate, upon two conditions, the first being that the State, in disposing of such sites, shall retain such control that it may periodically adjust the rates at which power is to be furnished to the public by the grantee of the power site; and the second being that the site shall not be disposed of by the State to any person having a monopoly of the water power in the vicinity.

It is the purpose of the writer to consider how far the proposed legislation is consistent with the Constitution, and in what respects it is repugnant thereto.

That it is within the power of Congress to enact laws designed to accomplish all of the above mentioned purposes within the territories, the District of Columbia, and "all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings" will not be questioned. For, over all such places, the United States has complete sovereignty and

jurisdiction and Congress possesses the exclusive power of legislation.

But, within the States, the conditions are essentially different. For it is the doctrine, settled by great decisions of the Supreme Court, that the government of the United States is one of enumerated powers and can exercise within the States only such powers as are actually granted to it by the Constitution either expressly or by necessary implication. The rule of construction declared by Chief Justice Marshall in *M'Culloch v. Maryland*,<sup>1</sup> has ever since been recognized as the criterion by which the constitutionality of Acts of Congress ought to be judged, viz:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution are constitutional."

This doctrine that the government of the United States is one of enumerated and limited powers was placed beyond the realm of reasonable controversy by the tenth amendment of the Constitution which is as follows:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

This, then, is the question to be considered: Are the avowed ends of the proposed legislation fairly and legitimately within the scope of the Constitution, and, if so, are the means to be employed appropriate to the accomplishment of those ends and consistent with the letter and spirit of the Constitution? The principal ends of the proposed legislation appear to be (1) the prevention of monopoly in the production of coal, phosphate, oil and other minerals in common use, and in the production and sale of electric power; (2) the regulation of the price of electric power; and (3) the reclamation of arid public lands.

There is no express provision in the Constitution conferring upon Congress the power to regulate either the mining industry or the power industry, or to prohibit monopoly therein. The Supreme Court has repeatedly held that the general power to preserve the public peace and the public morals, to protect the lives, health and property of the citizens, and to regulate their social, industrial and commercial relations in respect to all matters,

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<sup>1</sup> 4 Wheat 316.

save those over which jurisdiction has been conferred upon the United States or prohibited to the States, is vested in the several States. The decision of the Supreme Court in the case of *United States v. E. C. Knight Company*<sup>2</sup> is, together with its decisions in other cases therein cited, sufficient authority for the proposition that Congress, even under its broad and comprehensive power to regulate interstate and foreign commerce, can not go to the extent of regulating the manufacture and production of even those things which are destined and intended to become the subject matter of such commerce. Congress clearly has not the power to prohibit or deal with monopoly, or to regulate prices of commodities or charges for services in matters that are not fairly within the scope of commerce between the States, with foreign nations or with the Indian tribes; and neither the production of coal, oil and other minerals, nor the generation of electric power is a part of such commerce. That the power of the United States to regulate interstate and foreign commerce does not include the right to interfere with the appropriation or use of any waters within the States, except so far as may be necessary to prevent interference with or obstruction of navigable waters capable of being used as the means or instrumentalities of such commerce, is established by the decisions of the Supreme Court in the case of the *United States v. Rio Grande Dam and Irrigation Company*,<sup>3</sup> and *Kansas v. Colorado*.<sup>4</sup>

The only provision in the Constitution which has been or can be invoked to support the proposed conservation legislation is the following, which occurs in Section 3 of Article IV, viz:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

The determination of the question at issue, therefore, depends upon the true construction and interpretation of this clause.

This clause of the Constitution undoubtedly confers upon Congress the right to prescribe how, to whom and upon what terms and conditions the public lands of the United States may be sold or otherwise disposed of. Such lands are exempt from State taxation and the United States may exercise in respect to them the rights of an ordinary private proprietor. It also appears to be

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<sup>2</sup> 156 U. S. 1.

<sup>3</sup> 174 U. S. 690.

<sup>4</sup> 206 U. S. 46.

the accepted opinion that Congress may exercise over such lands a power analogous to the police power of the States so long as such power is directed solely to the protection of the proprietary rights of the United States therein. These propositions are supported by the decisions of the Supreme Court in *Van Brocklin v. Anderson*,<sup>5</sup> and *Camfield v. United States*.<sup>6</sup>

But the ownership by the United States of public lands situate within any State does not involve or carry with it any general or exclusive jurisdiction or power of legislation over such lands or their occupants. On the contrary, subject only to the right of the United States to provide for the sale or other disposition of the public lands and to make such rules and regulations concerning the same as may be required for the exercise, enjoyment and protection of its proprietary rights therein, each State possesses the same power of legislation and jurisdiction over the public lands of the United States situate within its boundaries as over lands held in private ownership by its own citizens.<sup>7</sup>

The right to reclaim its arid public lands seems to be fairly included within the scope of the proprietary rights of the United States and, when exercised for the purpose of fitting such lands for sale to settlers, should be deemed to be within the authority granted to Congress, although it is unquestionably true, as was decided in the case of *Kansas v. Colorado, supra*, that the United States has no jurisdiction or power of legislation over the general subject of the reclamation of arid lands within the States. It would also seem that Congress, in the exercise of its power to dispose of the public lands, may authorize the leasing of mineral or other lands for limited periods upon a royalty or rental basis. In fact, in the early case of *United States v. Gratiot*,<sup>8</sup> the power of Congress to authorize the leasing of lead mines upon the public land was upheld.

When the Constitution was adopted the only territory belonging to the United States consisted of the public lands that had been ceded by some of the original States. Subsequently other public lands were ceded to the United States by others of the original States. The object of the cession in every instance was, in addi-

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<sup>5</sup> 117 U. S. 151.

<sup>6</sup> 167 U. S. 518.

<sup>7</sup> *Fort Leavenworth Railroad Co. v. Lowe*, 114 U. S. 525; *Chicago, Rock Island, etc., Co. v. McGlinn*, 114 U. S. 542; *Ward v. Race Horse*, 163 U. S. 504, and *Kansas v. Colorado, supra*.

<sup>8</sup> 14 Pet. 526.

tion to the settlement of controversies concerning their ownership, to enable the United States to convert such lands into money to be used for the payment of the national debt and eventually to provide for the formation of new States to be admitted into the Union.

The clause of the Constitution granting to Congress the power to dispose of and to make regulations concerning the territory of the United States immediately follows the clause by which Congress is granted the power to admit new States into the Union, and should, I think, especially when considered in the light of history, be interpreted and construed, not only as granting the power, but also as imposing upon Congress the duty to dispose of the public lands of the United States to intending settlers so that new States may be erected and admitted into the Union. This duty it is true is political in its nature and of imperfect obligation; but it should nevertheless be recognized and performed by Congress.

Views very similar to those here advanced were expressed by the Supreme Court in the leading case of *Pollard et al. v. Hagan et al.*,<sup>9</sup> and the practical construction placed upon this clause of the Constitution by Congress as deduced from its legislation is in full accord with my contention.

The proposed conservation legislation, so far as it relates to the leasing of coal, phosphate, oil and other mineral lands, although it is in form an exercise of the power of the United States to provide for the disposition of the public lands in which such minerals exist, is really repugnant to the spirit of the Constitution for two reasons: first, because it contemplates the perpetual ownership by the United States of lands which are not required for the exercise of any of its governmental powers or duties, and which, as we have seen, it is the duty of Congress (although a political duty of imperfect obligation) to dispose of so that they may become private property, and subject in all respects to the jurisdiction and sovereignty of the States in which they are situate; and, second, because the real object sought to be attained by this legislation is the indirect control by Congress, by means of covenants and conditions to be inserted in the leases, of certain productive industries the right to regulate which is vested, not in Congress, but in the legislatures of the several States. If this legislation shall be adopted, it will inevitably give rise to conflicts between laws enacted by the several States in the exercise of their

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<sup>9</sup> 3 How. 212.

acknowledged constitutional powers for the purpose of preventing monopoly and regulating the conduct of these industries, on the one hand, and, on the other hand, the conditions and covenants of the leases by means of which the executive officers of the United States, acting under the authority of this legislation, will attempt to regulate and control the same industries. The ends sought to be accomplished are neither fairly nor legitimately within the scope of the Constitution, and consequently the enactment of the proposed measures would be a plain perversion of the power of Congress to dispose of the public lands of the United States.

To an adequate understanding of the relation to the Constitution of the proposed legislation concerning the disposition and control of the water power sites, a knowledge of the existing law relating to water and its use and the existing law relating to the business of generating electric power by means of hydro-electric plants and its distribution and sale to the public for light, heat and power purposes is essential.

Each State possesses absolute title to all water in the streams, rivers, lakes and other bodies of water, whether navigable or non-navigable, situate within its boundaries, and also possesses the legislative power of regulating the use of all such water, subject, first, to such private proprietary rights therein as have been acquired by natural persons and private and public corporations; second, to such private proprietary rights therein as have been acquired by the United States in its proprietary capacity either by virtue of its ownership of riparian lands or by appropriation; and, third to the right of the United States to regulate the use of navigable streams and waters as means of commerce with foreign nations and among the several States and with the Indian tribes. Each State also possesses the legislative power of determining, subject only to the duty of protecting vested rights, what rights of a proprietary nature may be acquired in its waters by natural persons and corporations. The private proprietary rights above mentioned, whether held by natural persons, private or public corporations, or by the United States, are all usufructuary in their nature and subject in large measure to the States' legislative power of regulation and control. The public right of the United States to regulate commerce with foreign nations, among the several States and with the Indian tribes, does not include the right to prohibit or regulate any use of water within a State by or under the authority of that State unless such

use naturally, fairly and directly tends to obstruct or in some manner to interfere with the navigability of some stream, lake or other body of water which is capable of being used as a means by which such commerce may be carried on. These propositions are, in the writer's opinion, abundantly supported by the authorities in the margin.<sup>10</sup>

The use of water appropriated for sale and distribution to the public is, by the laws of the State of California and of some of the other States, a public use subject to legislative regulation in general and in particular to the power of the State and its political subdivisions by or under the authority of law to prescribe the rates to be charged by the appropriators to the public for its use.<sup>11</sup>

It has also been generally held by the courts, in both the Eastern and Western States, that the generation of electric power for distribution and sale to the public is a public use or enterprise and that water used for that purpose is devoted to a public use.<sup>12</sup> That States may regulate the business of generating, distributing and selling electric power to the public and prescribe from time to time the rates which may be charged to the public for such power, necessarily follows as a legal consequence from the fact that the business itself is of a public nature and the property used in conducting it is devoted to a public use. This proposition is supported by a long line of decisions of the Supreme Court of the United States of which it is only necessary to cite *Munn v. Illinois*.<sup>13</sup> A further consequence of the fact that the generation, distribution and sale of electric power to the public is a public use is that lands, rights of way, private rights to the use of water and all other private property necessary for serving that use may be

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<sup>10</sup> *Hudson County Water Company v. McCarter*, 209 U. S. 349; *McCarter v. Hudson County Water Company*, 70 N. J. Equity 695, 14 L. R. A. (N. S.) 197; *U. S. v. Mission Rock Company*, 189 U. S. 391; *Martin v. Lessee of Waddell*, 16 Peters 367; *Munford v. Wardell*, 6 Wall. 423; *Pollard v. Hagen*, 3 How. 212; *Woodruff v. North Bloomfield Gravel Min. Co.*, 18 Fed. 753; *United States v. Rio Grande Dam and Irrigation Co.*, 174 U. S. 690; *Kansas v. Colorado*, 206 U. S. 46, 85-95, and the cases collected in a note in 50 L. R. A. on pages 757, *et seq.*

<sup>11</sup> *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 158-161; *Gutierrez v. Albuquerque Land and Irrigation Co.*, 188 U. S. 545, 555-6; *Spring Valley Water Works v. San Francisco*, 82 Cal. 286; *Craw v. San Joaquin and Kings River Canal and Irrigation Co.*, 130 Cal. 309.

<sup>12</sup> *Walker v. Shasta Power Co.*, 160 Fed. 856, 859, and the cases therein cited.

<sup>13</sup> 94 U. S. 113.

condemned and taken by or under the authority of the States by virtue of their eminent domain.<sup>14</sup>

That the public lands of the United States which have not been devoted by it to any public or governmental use are subject to the eminent domain of the States, and that under this power all or any of the so-called water power sites which may be required for the construction and operation of hydro-electric plants may be condemned and taken, are positions which, in the writer's opinion, are well supported by reason and to some extent by authority.<sup>15</sup> This seems to have been doubted by Mr. Justice Gray in the opinion of the Court rendered by him in the case of *Van Brocklin v. Tennessee*.<sup>16</sup> But the ground of Mr. Justice Gray's doubt appears to have been removed by the decision of the Supreme Court in the case of *South Carolina v. United States*,<sup>17</sup> wherein the rights of a proprietary nature belonging to a State are distinguished from governmental or public rights. If the United States may, as declared by the Supreme Court in the last mentioned case, levy taxes upon State agents in respect of a private business which they are transacting solely as State officers and for the benefit of the State, there seems to be little reason to doubt that the States, in the exercise of their power of eminent domain, may condemn for public use lands which are held by the United States in its purely proprietary capacity.

There is another legal consequence of the public nature of the business of generating, distributing and selling electric power to the public which is of very great importance in considering the constitutionality of the proposed conservation legislation. The corporations engaged in this business are, in a just and true sense, instrumentalities employed by the State governments to perform various public and quasi-public duties. The electric generating and distributing plants used for lighting cities and towns and furnishing power for the operation of railroads, for the reclamation of arid lands and the draining of swamp and overflowed lands, and for many other industrial uses are public utilities similar in character to railroads, telegraph and telephone systems and municipal water supply systems. The right to conduct a public business of this character is a franchise which can be

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<sup>14</sup> *Walker v. Shasta Power Company, supra.*

<sup>15</sup> *Lewis on Eminent Domain* (second edition), section 264 and the cases therein cited.

<sup>16</sup> 117 U. S. 151.

<sup>17</sup> 199 U. S. 437.



obtained only by a grant from the State by or under the authority of its laws. In exactly the same sense banking corporations organized under the laws of the United States to aid in conducting the fiscal operations of the government, and railroad corporations organized under Acts of Congress for the purpose of conducting interstate commerce and transporting the armies, military and other supplies and the mails of the United States are governmental agencies of the United States; and, to the extent that such banking and railroad corporations act as such agencies, it is established by many judicial decisions that they and their property and franchises are not subject to taxation, regulation or control by the several States. It is also settled by decisions of the Supreme Court of the United States that the United States has not the power to interfere with the States or their political subdivisions or agencies in the exercise of any of their political or governmental powers, nor the power to levy taxes upon or to regulate the exercise of franchises granted by the several States.

If Congress should enact a statute regulating the use of the waters belonging to the several States or their inhabitants for private purposes, or for any public use except navigation; or a statute regulating or prohibiting monopoly in the business of generating, distributing and selling electric power for either private or public uses; or imposing a tax or other charge on a franchise granted by a State for furnishing electric power to the public; or a statute declaring when or how the several States should exercise their power to prescribe rates for the sale of electric power, or their power to regulate or forbid monopoly in its production or sale, such a statute would clearly be unconstitutional. Yet such a statute would not, either in its purpose or in its legal consequences, differ substantially from the proposed conservation measures relating to the water power sites. The ends sought to be accomplished are not within the scope of the Constitution; and, for Congress to enact the pending measures would be to avail itself of the purely fortuitous circumstance that certain power sites are situate on the public lands of the United States as a means for the usurpation of powers which, under the Constitution, belong to the States.

The bill providing for the conveyance of the water power sites to the several States upon the conditions herein before specified is no less objectionable in principle than the measures first proposed. This bill involves an attempt on the part of Congress to dictate to the States when and how they shall exercise

their power of regulating rates for the sale of electric power, and how and by what means they shall exercise their power to regulate and control and to prohibit monopoly in the business of generating, distributing and selling electric power to the public.

The underlying motive of the proposed conservation legislation, and particularly the measures which concern the water power sites, is a profound distrust of the capacity of the State governments to govern their internal affairs with wisdom and justice, and an assumption of superior wisdom and virtue on the part of the national government. But whether or not this distrust is well founded, the ends sought to be accomplished are not fairly or legitimately within the scope of the Constitution, and the means proposed for their attainment are repugnant to its letter and spirit.

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